A

Ramanathan a/l Chelliah v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPLICATION NO W-09–4 OF 2005
GOPAL SRI RAM, HASAN LAH AND JEFFREY TAN JJCA
11 MAY 2009

C

Administrative Law — Exercise of judicial functions — Judicial review — Whether Court of Appeal has residual jurisdiction to review its earlier decision — Whether effective alternative remedy available — Whether manifest injustice occasioned to warrant review

D

Civil Procedure — Court — Jurisdiction — Court of Appeal — Residual jurisdiction to review own decision — Circumstances warranting review — Whether effective alternative remedy available — Whether manifest injustice occasioned to warrant review

E

The applicant/accused was convicted by the sessions court on two charges of outraging of modesty under s 354 of the Penal Code. On appeal, although the accused raised several points, the High Court confined itself to only the
F delay point and direction as to the standard of proof and quashed the conviction. However, the prosecution's subsequent appeal to the Court of Appeal was allowed and the conviction reinstated. It was clear from the affidavits filed that when the prosecution's appeal came before the court, counsel on both sides only argued on the two points relied upon by the High
G Court to quash the conviction. However, the Court of Appeal proceeded to deal with other points in the case and had rejected the attempt by the accused to address the arguments on the other points on the ground that the court was functus officio. Hence the application by the accused to set aside the order on the ground that it had been made without an opportunity being
H given to him to support the acquittal on grounds other than those given by the High Court. There were two issues which arose for the court's determination. First, whether the court had jurisdiction to review its earlier decision in an appeal heard and disposed by it. Second, if there was jurisdiction, the circumstances in which the review was available.

I

Held, allowing the application:

(1) It is settled that the Court of Appeal had jurisdiction to review its own

decision in a given case. The court has a residual jurisdiction to reopen an appeal which it had already determined particularly in cases where there was no further recourse to a party. On the facts, since the accused was tried in a subordinate court, the Court of Appeal was the court of last resort. The jurisdiction to reopen and review was therefore important in a case as the present to ensure that a manifest injustice does not go by uncorrected (see paras 2–3).

(2) The residual jurisdiction will be exercised if it can be shown that there was a probability of a significant injustice which must be clearly established and there was no effective alternative remedy to correct the injustice. The instant case was one in which an injustice was occasioned and there was no effective alternative remedy available to the accused (see paras 4–5).

(3) The accused, as the respondent to the appeal was clearly entitled to put forward other arguments in support of the orders made by the High Court in response to the prosecution's appeal. However it was plainly obvious that such an opportunity was denied to the accused which constituted a serious departure from well established principles of procedural fairness. The accused had therefore made out a strong prima facie case of miscarriage of procedural justice warranting the exercise of the residual power of the court to set aside its earlier judgment (see para 6).

[Bahasa Malaysia summary

Pemohon/tertuduh disabitkan oleh mahkamah sesyen atas dua tuduhan mencabul kehormatan di bawah s 354 Kanun Keseksaan. Atas rayuan, walaupun tertuduh membangkitkan beberapa perkara, Mahkamah Tinggi membataskan perbicaraan hanya terhadap isu kelewatan dan arahan mengenai standard pembuktian dan membatalkan sabitan tersebut. Walau bagaimanapun, rayuan pihak pendakwaan kemudiannya ke Mahkamah Rayuan dibenarkan dan sabitan dikenakan semula. Adalah jelas daripada afidavit-afidavit yang difailkan bahawa apabila rayuan pihak pendakwaan dikemukakan di mahkamah, peguam kedua-dua pihak menghujah atas kedua-dua perkara yang disandarkan oleh Mahkamah Tinggi untuk membatalkan sabitan. Walau bagaimanapun, Mahkamah Rayuan meneruskan untuk membicarakan isu-isu lain di dalam kes tersebut dan menolak cubaan tertuduh untuk membincangkan hujahan atas isu-isu lain atas alasan bahawa mahkamah telah functus officio. Maka permohonan ini oleh tertuduh untuk mengetepikan perintah tersebut atas alasan bahawa ia telah dibuat tanpa memberikannya peluang untuk menyokong pembatalan atas alasan-alasan yang lain daripada yang diberikan oleh Mahkamah Tinggi. Terdapat dua isu yang berbangkit untuk pertimbangan mahkamah. Pertama,

A sama ada mahkamah mempunyai bidang kuasa untuk menyemak keputusannya sebelum ini di dalam rayuan yang dibicarakan dan diputuskan olehnya. Kedua, jika terdapat bidang kuasa, keadaan di mana semakan tersebut boleh dibuat.

B

Diputuskan, membenarkan permohonan:

(1) Adalah matan bahawa Mahkamah Rayuan mempunyai bidang kuasa untuk menyemak keputusannya sendiri di dalam sesuatu kes. C Mahkamah tersebut mempunyai bidang kuasa baki untuk membuka semula rayuan yang telah diputuskannya khususnya di dalam kes-kes di mana tidak ada jalan lain untuk sesuatu pihak. Di atas fakta, oleh sebab tertuduh dibicarakan di mahkamah rendah, Mahkamah Rayuan adalah mahkamah tertinggi. Bidang kuasa untuk membuka semula dan D menyemak oleh itu adalah penting di dalam kes seperti ini untuk memastikan ketidakadilan yang jelas tidak terlepas tanpa diperbetulkan (lihat perenggan 2–3).

(2) Bidang kuasa baki akan dilaksanakan jika ia boleh ditunjukkan bahawa terdapat kemungkinan ketidakadilan yang ketara yang mesti dibuktikan E secara jelas dan tidak ada remedi alternatif yang berkesan untuk membetulkan ketidakadilan tersebut. Kes ini adalah salah satu di mana ketidakadilan telah berlaku dan tidak ada remedi alternatif yang berkesan untuk tertuduh (lihat perenggan 4–5).

F (3) Tertuduh, sebagai responden di dalam rayuan jelas berhak untuk mengemukakan hujahan-hujahan lain sebagai menyokong perintah yang dibuat oleh Mahkamah Tinggi sebagai menjawab rayuan pihak pendakwaan. Walau bagaimanapun, ia adalah jelas bahawa peluang tersebut dinafikan terhadap tertuduh yang menjadikannya G penyimpangan serius daripada prinsip matan keadilan prosedur. Tertuduh oleh itu telah membuktikan kes prima facie kegagalan keadilan prosedur yang jelas yang mewajarkan pelaksanaan kuasa baki oleh mahkamah untuk mengetepikan keputusannya yang terdahulu (lihat perenggan 6).]

H

Notes

For cases on judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 119–132.

For cases on jurisdiction, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) I paras 2252–2255.

Cases referred to

Chu Tak Fai v PP [2007] 1 MLJ 201; [2006] 4 CLJ 931, FC (refd)
Taylor v Lawrence [2002] EWCA Civ 90, CA (refd)

Legislation referred

Penal Code s 354

Karpal Singh (Sangeet Kaur Deo with him) (Karpal Singh & Co) for the applicant.

Jamhirah Ali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The applicant ('the accused') was convicted by the sessions court at Kuala Lumpur on two charges of outraging of modesty under s 354 of the Penal Code. The conviction was entered on 8 November 1996. However, the grounds of judgment were not made available until 26 October 2001, that is to say almost five years later. The accused appealed to the High Court. It is clear from the notes recorded by that court that several points were argued in support of the appeal. Among these was the effect of the long delay by the sessions court to deliver its written reasons as well as the correctness of its direction unto itself on the standard of proof applicable. However, when the High Court came to give its decision, it confined itself to only the delay point and direction as to the standard of proof. It held for the accused on both these points and quashed the conviction. The public prosecutor being dissatisfied with the acquittal appealed to this court, a differently constituted bench of which allowed the appeal and reinstated the conviction. The accused then applied to set aside the order of this court on the ground that it had been made without an opportunity being given to him to support the acquittal on grounds other than those given by the High Court. We heard argument and in a reserved decision set aside the earlier order of this court and gave certain directions to which we will refer later in this judgment. In arriving at our decision we had perforce to address two issues. First, whether this court has jurisdiction to review its earlier decision in an appeal heard and disposed by it. Second, if there is jurisdiction, then the circumstances in which the review is available.

[2] We will take the question of jurisdiction first. It is now settled that the Court of Appeal has jurisdiction to review its own decision in a given case. See, *Taylor v Lawrence* [2002] EWCA Civ 90, where it was held as follows:

> The Court of Appeal had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. The court had implicit powers to do that which was necessary to achieve the dual

> objectives of an appellate court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised.

See also *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201; [2006] 4 CLJ 931.

[3] We are of the view that it is important to recognise that this court has a residual jurisdiction to reopen an appeal which it had already determined particularly in cases where there is no further recourse to a party. In a case as the present, since the accused was tried in a subordinate court, this court is the court of last resort. The jurisdiction to reopen and review is therefore important in a case as the present to ensure that a manifest injustice does not go by uncorrected.

[4] That brings us to the second issue. The residual jurisdiction will be exercised:

> if it can be shown that there was a probability of a significant injustice which must be clearly established and that there was no effective alternative remedy to correct this injustice. It must be shown that the trial or the appeal has been critically undermined. The jurisdiction is not solely concerned with the case where the earlier process has or may have produced a wrong result. It must also be shown that there was special circumstances which resulted in the process having been corrupted. In short, the purpose is to correct the injustice (per Zaki Tun Azmi Chief Justice in *Badan Peguam Malaysia v Kerajaan Malysia* [2009] 2 MLJ 161; [2009] 1 CLJ 833).

[5] In our judgment the present case is one in which an injustice was occasioned and there is no effective alternative remedy available to the accused. As to the former, our reasons are as follows. It is clear from the affidavits filed that when the public prosecutor's appeal came before this court, counsel on both sides only argued on the two points relied upon by the High Court to quash the conviction. What comes across from the judgment of this court is that the court proceeded to deal with other points in the case as evidenced by the following passage:

We also found that the findings of the sessions court judge which had been alluded to earlier, where she accepted the evidence of material witnesses, SP1 and SP2 and that the ingredients of the offence with which the respondent had been charged, was successfully proven by the prosecution (see pp 619–624 and 664 of the AR) were correct and proper. We find no misdirection of the facts and evidence on the part of the trial judge.

A proper finding of facts and the application of the correct legal principles by the trial judge, clearly seen in the 95 over pages of the ground of judgment, ought not be disturbed. In view of the above, we therefore find no good reason for appellate intervention, much less order a retrial for hearing this appeal on its merits as proposed by the respondent.

[6] It is important to observe that this court came to the foregoing decision in the absence of the views of the High Court on the other points argued before it. In a matter so important as the appreciation of evidence, this court will be at a serious disadvantage without the benefit of the views of the intermediate appellate court. The accused did attempt to address arguments on the other points raised before the High Court as evidenced in the note of this court's decision delivered at the conclusion of arguments. But the note goes on to reject the attempt on the ground that the court was functus officio. In our judgment, the accused, as respondent to the appeal was clearly entitled to put forward other arguments in support of the orders made by the High Court in response to the public prosecutor's appeal. It is plainly obvious from the material we have thus far referred that such an opportunity was denied to the accused. This denial constitutes a serious departure from well established principles of procedural fairness. The accused has therefore made out a strong prima facie case of a miscarriage of procedural justice warranting the exercise of the residual power of this court to set aside its earlier judgment.

[7] As for the latter consideration, as we have already said, this court is the final arbiter in cases of this sort. Accordingly, the accused has no effective alternative remedy to correct the injustice done to him. It follows from what we have said thus far that the conditions for the exercise of this court's residual jurisdiction are satisfied. We therefore have no alternative but to allow the accused's motion and to set aside this court's earlier decision. The appeal shall be re-heard by a differently constituted bench of this court on all points save those already ruled upon in the earlier judgment. Since all points were taken before the High Court as to the correctness of the sessions court's decision, its views on the merits are of critical importance. We accordingly direct the High Court to furnish its views on the other points argued before it. The accused was a free man until the reversal of the High Court's decision. The consequence of our setting aside the earlier order of this court is that he

shall be set at liberty forthwith pending the re-hearing of the public prosecutor's appeal.

Application allowed.

Reported by M Sivabarathi